IN THE

Supreme Court of the United States

October Term, 1945.

No. 1213.

ANNIE MOORE, as administratrix of the goods, chattels and credits of WILLIAM J. SIMPSON, deceased,

Petitioner,

against

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support of Petition.

WILLIAM F. STANTON,
HENRY HIRSCHBERG,
J. R. THOMPSON,
Attorneys for Petitioner,
229 Liberty Street,
Newburgh, N. Y.

THE REPORTER COMPANY, Inc., Walton, N. Y.
1946

Index.

TABLE OF CASES CITED.

STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM.

ANNIE MOORE, as administratrix of the goods, chattels and credits of William J. Simpson, deceased,

Petitioner,

against

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HON. CHIEF JUSTICE AND THE ASSOCIATED JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Annie Moore, as administratrix of the goods, chattels and credits of William J. Simpson, deceased, by her attorneys, William F. Stanton, Henry Hirschberg and J. R. Thompson, the said William F. Stanton being duly admitted to practice in the Supreme Court of the United States, prays that a writ of certiorari issue to review the judgment and order of the United States Circuit Court of Appeals in and for the Second Circuit entered in the above case on the 21st day of February, 1946, affirming a judgment herein of the United States District Court in and for the Southern District of New York dismissing the complaint herein on the law and on the merits and with prejudice.

Opinions Below.

The opinion of the District Court is set forth in the record at pages 29 to 31 inclusive and is not officially reported.

The opinion of the Circuit Court of Appeals is set forth at pages 34 and 35 of the record and is not officially reported.

The order of the Circuit Court of Appeals affirming the judgment of the District Court appears in the record at page 36.

Jurisdictional Statement.

The order and judgment of the Circuit Court of Appeals was entered in the office of the Clerk of that court February 21st, 1946.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code as amended; Section 347, Vol. 28 U. S. G. A.:

Statement of Law Involved.

The action was brought in the New York Supreme Court, Orange County, to recover damages for the wrongful death of William J. Simpson, which occurred in North Carolina, December 16th, 1943 (39). Letters of administration had been issued to plaintiff by the Surrogate's Court of Orange County, New York State.

The action in the New York Supreme Court was instituted by the service of a summons on the defendant December 23rd, 1944 (39). The complaint was served April 17th, 1945 (2). An order of removal to the United States District Court, Southern District of New York

on the ground of diversity of citizenship was granted by the New York Supreme Court Special Term, Orange County, May 3rd, 1945 (19-23).

Motion to dismiss was made June 1st, 1945, and granted by the United States District Court, Hon. John Bright, Judge, August 30th, 1945 (25-79). Appeal was taken to the Circuit Court of Appeals by plaintiff, October 3rd, 1945 (79-81).

The ground of the order of dismissal was the claim that by the law of North Carolina, where the death of plaintiff's intestate occurred, the statute creating the cause of action specified a period of one year from death within which the action must be brought and that said period of limitation was a condition precedent which had expired prior to the institution of this action.

The defendant claimed that under the North Carolina statute, the highest court of that State, had held in cases where death had occurred outside the State of North Carolina, but the action had been brought within the State of North Carolina, *i. e.,* in cases where there was a conflict of jurisdiction, *that the statutory period described by the North Carolina statute was merely one of limitation and not a condition precedent* (*Tiffenbraun vs. Flannery,* 198 N. C. 397; 151 S. E. 857; 68 L.R.A. 210).

The learned District Judge in a short opinion (85-93) held that the limitation in the North Carolina statute (1943, Chapter 28, Section 173) had been construed as a condition precedent by the highest court of North Carolina and that in his opinion the New York State Courts would have so construed the North Carolina Statute. He did not refer in his opinion to *Tiffenbraun vs. Flannery, supra,* or the cases cited by plaintiff (91-93).

Plaintiff contended that this case pursuant to the doctrine of *Erie Railroad Company vs. Tompkins,* 304 U. S. 64, should be decided in accordance with the law of New York State and that there is persuasive data showing that the public policy and law of New York State and the probable decision of the Courts of that State and of the Court of Appeals, if his action had remained in that State, would have been determined by the law of the forum and that the two-year statute of limitation prescribed in the New York State Death Statute would have been applied, and the limitation in the North Carolina Statute construed as a mere limitation and not a condition precedent in view of the decision of the highest court of that State in *Tiffenbraun vs. Flannery,* 198 N. C. 397, and in view of the public policy of New York State as expressed in Sections 13 and 55 of the New York Civil Practice Act (64-66, 68-69).

The United States Circuit Court of Appeals, Second Circuit, in a short opinion affirming (p. 35 record) held that the *Tiffenbraun* case was not susceptible of the construction claimed by appellant.

Scope of Argument.

The question here presented briefly stated is the following: Would the Courts of New York State and particularly the Court of Appeals of that state under the facts of the case at bar have construed the limitation of the North Carolina Statute as a limitation and not a condition precedent and under the public policy of New York State applied the law of the forum and the two-year New York death limitation to this action?

Appellant's contention is that the Courts of New York State would have applied the law of the forum and the public policy of that state and consequently the

two-year statutory limitation, and that the Court below erred in finding to the contrary.

Statutes Involved.

The statutes involved are general statutes of North Carolina Chapter 28, Section 173, formerly Section 160 C. S.; Section 174 formerly Section 161 C. S., and Section 149 formerly Section 137 C. S., and Section 130 of the Decedent's Estate Law of the State of New York and Chapter 506 of the Laws of 1943 of the State of New York effective April 15th, 1943, now Section 13 of the Civil Practice Act, of that State and Chapter 516 of the Laws of 1943 in effect April 15th, 1943 now Section 55 of the Civil Practice Act of that state. These statutes insofar as applicable are set forth in the appendix.

Reasons for Granting the Writ.

1. The question here presented it is claimed involves a conflict of laws between the public policy of the State of North Carolina and the public policy of the State of New York as exemplified by the statutes and opinions of the highest courts of the respective states; also it is claimed there has been a misconstruction by the Circuit Court of Appeals of the effect upon the Courts of New York State of the decision in *Tiffenbraun vs. Flannery,* 198 N. C. 397-151 S. E. 857; 68 L.R.A. 216.

2. The decision of the Circuit Court of Appeals has reference to an important question of the local law of the State of New York, in which state this action originated, and has been decided in a way probably in conflict with the applicable doctrine of that state, and with the applicable local decisions.

3. The Circuit Court of Appeals has rendered a decision on an important question of Federal Law which it is believed has not been finally settled by this court.

By the public policy of the State of New York, as expressed by the decisions of its highest court, the Court of Appeals, the period prescribed for the bringing of an action to recover damages caused by death contained in the New York Statute has been consistently construed as a period of limitation only and not a condition precedent annexed to the cause of action. The language of the New York Statute prescribing the period of limitation is substantially identical with that of the North Carolina Statute. While it is conceded that in cases arising in North Carolina between citizens of that state, the highest court of North Carolina has construed its period of limitation in its death statute as a condition precedent annexed to the cause of action, it is also claimed that at the same time in the *Tiffenbraun* case it construed the period of limitation of a foreign statute as not a condition annexed to the cause of action and did so in order to favor North Carolina citizens. Under these circumstances it is contended that the highest court of New York State, had this case been permitted to remain in that jurisdiction, would have construed the limitation in the North Carolina statute as not a condition precedent annexed to the cause of action, but as a mere statute of limitation, and that this is shown not only by the decisions of New York Court of Appeals but by the New York statutes referred to here and in the annexed brief.

4. The case is an important one involving as it does a construction of the Federal Courts pursuant to the doctrine of *Erie Railroad Company vs. Tompkins*, 304 U. S. 64, regarding the statutes and public policy of the State of New York.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court to review the decision of the Court below.

Dated, April , 1946.

WILLIAM F. STANTON,
HENRY HIRSCHBERG,
J. R. THOMPSON,
Attorneys for Petitioner,
229 Liberty Street,
Newburgh, N. Y.

APPENDIX.

The laws of the State of North Carolina, referred to in the complaint, are General Statutes of North Carolina, 1943, Chapter 28, Section 173 (formerly Section 160 C. S.); Section 174 (formerly Section 161 C. S.); and Section 149 (formerly Section 137 C. S.), which sections are as follows:

> "§28-173. DEATH BY WRONGFUL ACT; RECOVERY NOT ASSETS; DYING DECLARATIONS.—When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy."

The laws of the State of New York referred to are as follows:

(a) The death statute of the State of New York, viz, Section 130 of the Decedent's Estate Law, reading as follows:

"SECT. 130. ACTION BY EXECUTOR OR ADMINISTRATOR FOR NEGLIGENCE OR WRONGFUL ACT OR DEFAULT CAUSING DEATH OF DECEDENT.

"The executor or administrator duly appointed in this State, or in any other State, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit."

(b) Chapter 506 of the laws of 1943 New York State in effect April 15th, 1943, now Section 13 of the Civil Practice Act of that State, and Chapter 516 of the laws of 1943 in effect April 15th, 1943, now Section 55 of the Civil Practice Act of that State, reads as follows:

"SECT. 13. LIMITATION WHERE CAUSE OF ACTION ARISES OUTSIDE OF THE STATE.

"Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of the time limited by the laws either of

this State or of the state or country where the cause of action arose, for bringing an action upon such cause of action, except that where the cause of action originally accrued in favor of a resident of this State, the time limited by the laws of this State shall apply."

"SECT. 55. ACTION AGAINST NON-RESIDENT: SAME LIMITATION AS AGAINST RESIDENT. Except as provided in section thirteen of this act an action upon any cause of action may be brought in a court of this state within the time limited therefor by the laws of this state, and may not be brought thereafter, and the time limited for bringing a like action by the laws of the place of residence of the person against whom the cause of action arose or by the laws of the place where the cause of action arose, shall not apply."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.

ANNIE MOORE, as administratrix of the goods, chattels and credits of William J. Simpson, deceased,
Petitioner,
against
ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

PRELIMINARY STATEMENT.

The opinions below, the statement of the matter involved and the questions presented appear in that petition for a writ of certiorari herein and in the interest of brevity are incorporated here by reference.

II.

SUMMARY OF ARGUMENT.

POINT I.

This case should have been decided in accordance with the law of the State of New York and the burden is placed upon this Court to determine how the Court of Appeals of that State would have ruled on the proposition here presented.

POINT II.

Where a conflict of law was involved in a case where a suit was decided by the highest court of North Carolina in an action to recover for death occurring in another State, the highest court of North Carolina construed the statutory limitation of the foreign State, not as a condition precedent, but as a mere statute of limitation and applied the North Carolina statutory limitation as the law of the forum.

POINT III.

Had the motion to dismiss been made in the case at bar while the action was pending in the State of New York, it is submitted that the Courts of such State following the public policy of that State, and in view of the North Carolina decision in *Tiffenbraun vs. Flannery*, 198 N. C. 397, would have applied the law of the forum holding under the facts of this case the North Carolina statute to be merely one of limitation and not

a condition precedent and applied the New York State two-year limitation and would have denied the motion to dismiss.

III.

ARGUMENT.

POINT I.

This case should have been decided in accordance with the law of the State of New York and the burden is placed upon this Court to determine how the Court of Appeals of the State would have ruled on the proposition here presented.

Erie Railroad Company vs. Tompkins, 304 U. S. 64, 82 U. S. Law Ed. 1188.

POINT II.

Where a conflict of law was involved in a case where a suit was decided by the highest court of North Carolina in an action to recover for death occurring in another State, the highest court of North Carolina construed the statutory limitation of the foreign State, not as a condition precedent but as a mere statute of limitation and applied the North Carolina statutory limitation the law of the forum.

Tiffenbraun vs. Flannery, 198 N. C. 397, 151 S. E. 857, 68 L.R.A. 210.

In that case the death occurred in the State of Florida, where there was a statute providing that the action should be brought in two years. The suit was brought in North Carolina against the defendant, a resident of North Carolina, more than a year after the death but within the two-year period. The North Carolina Court dismissed the action on the ground that comity and the public policy of North Carolina did not permit the plaintiff to have the advantage of the Florida two-year statute to the detriment of a citizen of North Carolina where limitation was one year. In other words, although as shown by the opinion in that case the general rule of construction established in North Carolina was to the effect that the limitation in its statute was a condition precedent, notwithstanding *the Court also construed similar provisions in foreign states as mere statutes of limitation where conflict of law was involved and applied the rule of the forum for the benefit of the North Carolina citizens.* Whatever theories may be advanced, it is submitted that it is extremely illogical to hold that a time limitation is a part of the cause of action and at the same time to hold that a citizen of Florida does not take that part of the Florida cause of action or statute with him when he sues in North Carolina.

The Federal Courts have referred to this inconsistency of construction.

Theroux vs. Northern Pacific R. R. Co., 64 Fed. 84, 12 C.C.A. 52.
Keep vs. National Tube Company, 154 Fed. 121.

Those Federal cases clearly point out that if a provision of a death statute with reference to time is a part of the cause of action, the plaintiff suing by virtue of the statute should be deemed to take the time limitation as a part of the cause of action with him into a foreign jurisdiction, even if the limitation under the statute in that jurisdiction has expired. In other words, the North Caro-

lina Court in the *Tiffenbraun* case should have recognized the two-year time limitation of the Florida statute as a condition of the cause of action and in refusing to do so violated proper rules of comity. The Court said in the *Theroux* case, *supra,* at page 86:

> "It follows, of course, that if the courts of another State refuse to permit the cause of action to be sued upon during a part of the period limited by the foreign law to the extent they refuse to give effect to the foreign law and by so doing impair the right intended to be created."

This impairment of the right created by the foreign statute can only be done on the theory adopted by the North Carolina Court in the *Tiffenbraun* case, viz: *by treating the time limitation as a mere statute of limitations and thereby applying the rules of the forum with reference to the time limitation.* That is exactly what the North Carolina Court did in the *Tiffenbraun* case. This is shown by the head note to that case, which reads as follows at page 210 of 68 L.R.A.

> "Conflict of Laws. The time within which suit on a cause of action for wrongful death must be brought *is determined by the laws of State in which suit is brought rather than of the State in which the cause of action accrued.*"

Under that doctrine the law of the New York forum the two-year statute would be applicable here. *That the Court in the North Carolina case treated the time limitation as a mere statute of limitations, where there was a conflict of law,* is further shown by this other head note construing the *Tiffenbraun* case in 68 L.R.A. 210.

> "Statutes of limitation are procedural in nature and working upon the remedy govern the cause of action in the particular forum in which such cause of action is asserted."

Returning to *Tiffenbraun vs. Flannery, supra*, it clearly appears in the opinion of the North Carolina Court therein that the Court was treating the limitation period in the Florida statute, although the same is in language similar to the North Carolina statute as a statute of limitation (p. 404 opinion). To give the Florida statute any other effect the North Carolina Court said would be contrary to the public policy of the State of North Carolina *and that, therefore, it would apply the law of North Carolina to suits brought in that State with reference to the time period instead of the law of the State creating the cause of action.*

The North Carolina Court said (p. 404):

> "All statutes of limitation are essentially time clocks and while Cons. Stat. 160 has been construed as a condition annexed to the cause of action *it is also a time limit to the procedure.*"

That the highest court in North Carolina treats these provisions dependent upon the facts and circumstances *both* as a condition precedent and as a statute of limitation is also shown by the head note to the official report of *Tiffenbraun vs. Flannery,* 198 N. C. 397.

It is no answer to the foregoing argument to assert that if the time limitation in the North Carolina statute is a condition precedent the cause of action is extinguished within one year and cannot be given effect in the State of New York in accordance with the law of that forum. As pointed out in the Federal cases hereinbefore cited, if the limitation is treated as a condition precedent it should accompany the cause of action into a foreign jurisdiction even under circumstances where the limitation of the foreign jurisdiction is more than the limitation of the statute in the jurisdiction where the suit is instituted.

If the North Carolina one-year limitation be considered a mere statute of limitation under the special facts of this action, concededly the New York two-year limitation—the *lex fori* prevails and the order appealed from should be reversed.

Was it open to the New York Courts under the facts of this case to so treat the North Carolina limitation as a mere statute of limitations?

Concededly the Courts of North Carolina have treated the one-year limitation as *both* a mere statute of limitation and as a condition annexed to the cause of action. In any particular action it must be one or the other and cannot be both in the same action. With this double treatment of the limitation it being considered by the North Carolina Courts as now a condition annexed to the cause of action and again a mere statute of limitation it was open to the New York Courts to construe *Tiffenbraun vs. Flannery,* 198 N. C. 397-68, Am. L.R.A. 210, as having treated the North Carolina limitation as a mere statute of limitations under the facts of the present action.

While it is true that in the *Tiffenbraun* case the cause of action arose in Florida, the North Carolina Court was nevertheless applying and construing the North Carolina statute and in applying it to that action *could only apply it as a statute of limitations* of the *lex fori* not as a condition annexed to the Florida action.

It was claimed by respondent that the decisive factor leading the North Carolina Court in the *Tiffenbraun* case to employ the North Carolina limitation as a mere statute of limitation of the forum was a stipulation of the parties that the Florida limitation was a mere statute of limitations not contained in the body of the Florida Death Act. True, such a stipulation was made but the

North Carolina Court *did not make it the basis of its decision,* but took the occasion to announce a general policy that the North Carolina limitation would apply and that even if a longer limitation was fixed and held by the statute or decisions of another state where the accident occurred to be a condition annexed to the foreign cause of action the North Carolina Courts would treat such condition precedent of the foreign statute as a mere statute of limitations in any action on the foreign statute in North Carolina and apply the shorter North Carolina period as the statute of limitations of the forum for the protection of the North Carolina citizen.

The reason was thus explained by the Court as a matter of North Carolina legislative policy (p.):

> "Certainly it is not to be supposed that the legislative department intended to confer upon non-residents more extensive rights in the Courts than accorded to citizens of this State."

Thus, if we assume that the New York two-year limitation had been held in that state a condition annexed to a death claim arising in that state the scope of the *Tiffenbraun* opinion is that in an action on such a claim in North Carolina against a citizen of the latter state the North Carolina Court would disregard the New York ruling and consider the limitation of the foreign statute a mere statute of limitations and apply the shorter period of the North Carolina statute as the law of the forum.

Such being the North Carolina rule why was it not open had this case remained in the New York Courts for those Courts to treat the North Carolina limitation as a mere statute of limitations and apply the longer New York period for the benefit of the New York citizen and as the law of the forum?

While the interpretations of text writers and annotators are not conclusive in the construction of Court decisions and opinions, they are perhaps of more weight, being impartial, than the offered constructions of counsel and it is for that reason that we here fortify our view of the scope of the *Tiffenbraun* opinion with the similar construction of the annotator in Am. L.R.A. He says, 68 Am. L.R.A.:

> "It is to be noted that the Florida statute of limitations was a general statute and was not embraced in the statute creating the cause of action *but in order to discuss, as the Court did, the question under consideration it must have been assumed by the Court that the Florida statute was a condition annexed upon the cause of action itself.*"

Was it not at the very least open to the New York Courts to adopt the construction of the *Tiffenbraun* case given by the Am. L.R.A. editor? Is it not reasonably probable that the New York Courts would have adopted that construction? If it is reasonably debatable whether the New York Courts would have adopted that construction, should not the Federal Court under the doctrine of *Erie Railroad Company vs. Tompkins,* 304 U. S. 64, have given the benefit of that possibility to appellant and reversed the order of the District Court?

There is nothing in the cases cited by respondent below to establish that the New York Court of Appeals would not have adopted the construction of the *Tiffenbraun* case here claimed. In none of those cases had the highest court of the foreign statute ever announced a legislative or state policy to treat the limitation of a foreign statute where the cause of action arose as a mere statute of limitation regardless of whether it was deemed a condition precedent in such foreign state. In none of such cases had the foreign state where the cause of action

accrued announced the policy of applying its own statute of limitations when to the advantage of its citizen defendant in a death caused in a foreign state. We submit that a precisely analogous situation to that in the case at bar has not been presented to the New York Courts —nor any case where the New York Courts have had to consider the effect of an announced general policy such as that stated in the *Tiffenbraun* case.

That the New York Court of Appeals would if reasonably possible or plausible adopt such construction as would consider the North Carolina limitation as a mere statute of limitation is shown by the fact that the New York death limitation although contained in the New York death statute is deemed a mere statute of limitation.

Sharrow vs. Inland Lines, 214 N. Y. 101.

The entire policy of New York State and its Courts has been to treat these death action limitation periods as not conditions annexed to the action *wherever it has been possible to do so* (see pp. 13-17 main brief).

It is only where some expressly and specifically positive language of the foreign statute has precluded the Court of Appeals from so doing that it has not treated the foreign limitation as a mere statute of limitations. Such was the phrase "but *only* within a year" (*Sharrow vs. Inland Lines,* 214 N. Y. 101, page 108), and the positive words in the New Jersey statute *"and not thereafter"* (*Schwertfeger, as admrx., vs. Scandinavian Am. Line,* 186 App. Div. 69, affirmed 226 N. Y. 696—see N. Y. State Ann. 2:47). There is no such analogous words in the North Carolina statute.

POINT III.

Had the motion to dismiss been made in the case at bar while the action was pending in the State of New York, it is submitted that the Courts of such State, following the public policy of that State, and in view of the North Carolina decision in *Tiffenbraun vs. Flannery*, 198 N. C. 397, would have applied the law of the forum holding under the facts of this case the North Carolina statute to be merely one of limitation and not a condition precedent and applied the New York State two-year limitation and would have denied the motion to dismiss.

We have seen that it is encumbent upon the Federal Court to ascertain and apply the law of New York State.

Erie Railroad Company vs. Tompkins, 304 U. S. 64.

In case that should ascertain that the law of New York State has not been enunciated with respect to a situation such as that here presented, then the Court could have deferred action until authoritative decision by the New York State Courts.

Motor Service vs. McLaughlin, 323 U. S. 101.

We respectfully submit that in view of the decision by the highest court in North Carolina in *Tiffenbraun vs. Flannery,* 198 N. C. 397, *treating the time limitation as a mere statute of limitations rather than a condition precedent under the circumstances of that case,* and the conflict of laws, that the state courts of New York State would in the case at bar, had it remained in those courts, construed the North Carolina limitation of one year as a mere statute of limitations and consequently would have applied the law of the forum, *i. e.,* the law of New York, to wit, the two-year statute contained in Section 130 of Decedent's Estate Law of that State.

The present policy of the State of New York is unmistakable. It considers the time limitation contained in death statutes as mere statutes of limitations.

Sharrow vs. Inland Lines, 214 N. Y. 101.

In the early days of death statutes following Lord Campbell's English Act, the Courts manifested a tendency to vary strict construction and almost invariably considered the time limitation as a condition precedent annexed to the cause of action. As the years passed and these statutes became commonplace the tendency has been liberalized and many states now treat the time limitation as a mere statute of limitations unless the language is so clear as not to admit of such construction. In *Sharrow vs. Inland Lines,* 214 N. Y. 101, the Court construed the limitation in the New York statute *as a mere statute of limitations.* The language of the New York statutes is much stronger against such a construction than is the North Carolina statute. The New York statute says "such an action *must* be commenced within two years after the decedent's death." The North Carolina statute does not use the word "must" but says that the action is "to be brought within one year after such death."

The New York Court of Appeals in the *Sharrow* case held that the time limitation in these statutes constitutes a mere statute of limitations unless the language is *specifically* that of a proviso, or such as cannot possibly be construed other than as a condition precedent. There can be no doubt when we examine and compare the New York statute with the North Carolina statute that the New York Court would construe the language of the North Carolina statute as merely constituting a statute of limitations. Moreover the North Carolina court *having under circumstances of conflict of law construed its own statute as a mere statute of limitations* the Court

of Appeals *would not be bound* to adopt the construction that it was a condition precedent because under certain other cases between citizens of North Carolina, the highest court of North Carolina had adopted that construction.

The construction of the North Carolina statute, had the case at bar remained in the New York State court, would have been exclusively for the New York State courts on the motion to dismiss, and it is respectfully submitted that the question to be determined here is what would the New York decision have been.

That the Court of Appeals has assumed the right where actions have been brought in New York State to recover for death caused in a foreign state to construe the death statute of the foreign state, is shown by the opinion of the Court in *Sharrow vs. Inland Lines,* 214 N. Y. 101, construing a previous Court of Appeals decision in *Johnson vs. Phoenix,* 197 N. Y. 316.

In *Johnson vs. Phoenix, supra,* the Court of Appeals had held that the one year limitation in a Canadian statute was a condition precedent and controlled the Court in New York State. The Judge writing for the Court in the *Sharrow* case, however, pointed out that the language of the Canadian statute was that the action was not only to be brought within a year "but *only* within a year." Judge Bartlett writing for the Court of Appeals said that the use of the *positive and exclusive phrase* "but only within a year" was decisive of an intention under the Canadian law not to permit any action under any circumstances after the year (108).

There is no provision either in the North Carolina or the New York statute analogous to those positive phrases that the action could be brought *but only* within the year. The fact that the Court of Appeals in the *Sharrow* case pointed out that it was the nature of that

language used in the Canadian statute that lead them to construe it as a condition precedent rather than a reference to any Canadian decisions, shows that that Court assumes the right to construe the effect of these foreign death statutes when the action is brought in New York State.

The case of *Schwertfeger, as admx., vs. Scandinavian American Line,* 186 App. Div. 89, affirmed 226 N. Y. 696, is in nowise contrary to the foregoing. In that case the Court of Appeals held a two year period in a New Jersey statute was a condition precedent. An examination of the record of the Court of Appeals shows that the question here presented was not there argued. It was conceded that the New Jersey statute was applicable on the facts of the case, but it was argued unsuccessfully that the time taken by a previous action in the Federal Courts should count. Undoubtedly the reason that the proposition here argued was not advanced or considered in that case was because of the language of the New Jersey statute. The New Jersey statute not only said that the action shall be commenced within two years after death but added the words *"and not thereafter."* See New Jersey Stat. Ann. 2:47. Obviously where a statute specifically states that under no circumstances shall the action be brought after the expiration of the period fixed, the statutory period must be construed as a condition precedent. There is no such analogous expression in either the New York State statute or the North Carolina statute.

When we turn from the decisions of the courts in New York State, hereinbefore referred to, and examine the statutes we find that *the broad and liberal policy of construction adopted by the Court of Appeals has been manifested also by very recent legislative enactments.* I refer here to Sections 13 and 55 of the New York Civil Practice Act heretofore quoted. It may be urged that

these sections having been inserted in the Civil Practice Act are intended to apply only generally with reference to the statute of limitations and not with reference to other general laws of the state such as Section 130, Decedent's Estate Law. We submit that the broad language of these acts show a legislative intention not to so limit them. Section 13 specifically states that where a cause of action originally accrued in favor of a resident of this state, *the time limited by the laws of this state shall apply.* That certainly applies in terms to the case at bar which was an action accruing in a foreign state in favor of a resident of the State of New York and the courts of New York State under the statute as well as under the construction heretofore enunciated by those courts have the right and power to give this plaintiff the benefit of the statute of limitations contained in Section 130, Decedent's Estate Law, just as much as the North Carolina Courts had the right to give the resident of that State in the *Tiffenbraun* case the benefit of the short North Carolina statute as against the longer Florida statute, where the death occurred.

Section 55, Civil Practice Act, heretofore quoted specifically says *an action may be brought in the New York State Courts within the time limited therefor by the laws of this State* and not thereafter and *that the time limited for bringing like actions by the place of residence of the defendant, or by the laws of the place of residence where the cause of action arose shall not apply.* That language is broad enough to show an intention to have it applicable to every action brought in the courts of the State of New York including an action to recover damages for negligence causing death.

Moreover in construing these sections of the Civil Practice Act it should be borne in mind that at the time of their enactment in New York, the Court of Appeals

in the *Sharrow* case had already declared that the time limitation in Section 130, Decedent's Estate Law was a mere statute of limitations and not a condition precedent. Therefore, in any event Sections 13 and 55 of the Civil Practice Act would be applicable to the cause of action created by the Decedent's Estate Law and to any similar action arising in a foreign state when suit would be brought in the State of New York.

The case of *Tonkonogoff's Estate*, 177 Misc. 1015, is not contrary to this argument. Surrogate Foley there uttered a dictum to the effect that Sections 13 and 55, Civil Practice Act were not applicable to the situation in the case before him where he said the right of action had been extinguished. However, that matter was not before the Surrogate as he was of the opinion that the claimant in the case before him was not a bona fide resident of the State of New York at any time. It is significant, however, that *after the decision of the Tonkonogoff case, which was decided in 1941, the legislature of the State of New York amended Sections 13 and 55 of the Civil Practice Act so as to specifically and expressly provide that in all such cases the time limited by the laws of New York State, and not by the law of a foreign state, should apply* (Chapter 506, Laws of 1943, in effect April 13th, 1943).

IV.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM F. STANTON,
HENRY HIRSCHBERG,
J. R. THOMPSON,
Attorneys for Petitioner,
Office & P. O. Address,
229 Liberty Street,
Newburgh, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1213

ANNIE MOORE, as administratrix of the goods, chattels and credits of William J. Simpson, deceased,

Petitioner,

against

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

THOMAS W. DAVIS,
M'CREADY SYKES,
Counsel for Respondent.

STEWART & SHEARER,
Attorneys for Respondent,
45 Wall Street,
New York City.

INDEX.

Table of Cases Cited.

STATUTES AND OTHER REFERENCES.

IN THE

Supreme Court of the United States

OCTOBER TERM 1945.

No. 1213.

ANNIE MOORE as administratrix of the goods, chattels and credits of William J. Simpson, deceased,

Petitioner,

against

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinions Below.

The opinion of the District Court is set forth in the record at pages 29 to 31, inclusive, and is not officially reported.

The opinion of the Circuit Court of Appeals, dated February 21, 1946, is reported in 153 F. (2d) 782, and is also set forth at pages 34 and 35 of the record.

Statement.

On page 3 of his statement, petitioner's counsel in the third paragraph states that "the defendant" claimed under the North Carolina statutes, etc. This obviously is a

typographical error as the contention set forth in that paragraph was advanced by the "plaintiff" in the court below. Otherwise the petitioner's statement of facts appears to be correct.

Argument.

It is the contention of the respondent that the Petition for a writ of Certiorari should be denied, for the following reasons:

(1) That both the District Court and the Circuit Court of Appeals correctly construed the provisions of the applicable North Carolina statute under which the petitioner claimed to be entitled to relief, in the light of the decisions of the Supreme Court of the State of North Carolina construing that statute.

(2) That the New York courts and the Federal courts sitting in New York are bound by the interpretation placed upon the foreign statute by the court of last resort of the foreign state.

(3) That Sections 13 and 55 of the Civil Practice Act of the State of New York are merely general statutes of limitation and have no application to statutory causes of action like the one created by the North Carolina Death Act here under consideration.

The reasons advanced by the petitioner for requesting the granting of a writ of certiorari are all based upon a misconception of the decisions cited as being applicable and an erroneous construction of the New York statutes cited as sustaining petitioner's contention.

POINT I.

The North Carolina Supreme Court has uniformly construed the time limitation of the death statute here under consideration as a condition annexed to the cause and not as a mere statute of limitation.

The petitioner's complaint predicates her right to recover upon the law and statutes of North Carolina granting a cause of action for wrongful death, it appearing that the death of her intestate occurred in the State of North Carolina while he was a passenger on the train of the respondent (R. 4-6).

The full text of the applicable statute is as follows:

> "§28-173. Death by Wrongful Act; Recovery Not Assets; Dying Declarations.—When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy.
>
> In all actions brought under this section the dying declarations of the deceased as to the cause of his death shall be admissible in evidence in like

manner and under the same rules as dying declarations of the deceased in criminal actions for homicide are now received in evidence."

The Supreme Court of North Carolina, the court of last resort of that State, has uniformly held that the requirement in the statute that action shall be brought within one year after such death is a condition annexed to the cause of action and is not a statute of limitations which must be pleaded by the defendant.

Taylor v. *Cranberry Iron etc. Co.*, 94 N. C. 525 (1886);
Gulledge v. *Seaboard Air Line Ry Co.*, 147 N. C. 234 (1908);
Bennett v. *North Carolina Railroad Company*, 159 N. C. 345 (1912);
Hatch v. *Alamance Railway Co.*, 183 N. C. 617 (1922);
Hanie v. *Penland*, 193 N. C. 800 (1927);
Neeley v. *Minus*, 196 N. C. 345 (1928);
Mathis v. *Camp Manufacturing Co.*, 204 N. C. 434 (1933).

These decisions establish conclusively that the one year time limitation contained in the North Carolina statutes is made a condition of the right and that it shall expire after the period of limitation has elapsed. In the case at bar the death of petitioner's intestate occurred on December 16, 1943 (R. 18), and the one year period from the date of death expired on December 16, 1944, at which time the right of action granted by the North Carolina statutes was extinguished. At the time petitioner commenced her suit on December 23, 1944, no right of action under the North Carolina Death Statute existed and her complaint did not state a cause of action upon which relief could be granted and it was properly dismissed on defendant's motion.

POINT II.

In construing a statutory cause of action created by the law of a foreign state the Courts of New York have followed the decisions of the highest court of the foreign state interpreting such statute.

On several occasions the New York Court of Appeals has been called upon to interpret the statutes of sister states on suits brought to enforce causes of actions granted by statutes of these states. In each instance the New York Court of Appeals has followed the interpretation of the statutes of other states which have been made by the highest courts of the states enacting them.

In case of *Schwertfeger* v. *Scandinavian-American Line*, 186, App. Div. 89 (Affirmed 226 N. Y. 696 on the opinion of Shearn, J. below), the Appellate Division of the Supreme Court, State of New York, reversed the judgment of the lower court and held that an action instituted by plaintiff to recover damages for the death of her intestate by the negligence of defendant under the provisions of a New Jersey statute should have been dismissed where it appeared the action was instituted more than two years after death, and the period of limitation in the New Jersey death statute is two years (2 Comp. Stat. p. 1908, §8, as amended by P. L. 1913 p. 586). In arriving at this conclusion, the Appellate Division stated that it was bound by the interpretation placed upon the foreign statute by the highest court in the foreign state. In so holding, the Court at page 90 of its opinion stated:

> "It is, of course, conceded that no cause of action existed under the common law and that the sole right to maintain an action to recover damages for

the death of the intestate caused by the negligence of the defendant was created by and depends upon the provisions of the statute of New Jersey, where the accident occurred. (*Johnson* v. *Phoenix Bridge Co.*, 197 N. Y. 316, 319; *Gurofsky* v. *Lehigh Valley R. R. Co.*, 121 App. Div. 126, 128; affd., 197 N. Y. 517.) In this State it is now held that the time prescribed by statute within which the action to recover damages for death caused by wrongful act may be commenced is not of the essence of the right to maintain the suit, but is subject to a statute of limitations. (*Sharrow* v. *Inland Lines, Ltd.*, 214 N. Y. 101.) In the State of New Jersey, however, it is the settled law that the two-year period within which an action is required to be brought under the New Jersey Death Act is not a period of limitation, but is an integral part of the remedy and a condition precedent to the maintenance of an action under that statute. (*Eldridge* v. *Philadelphia & Reading R.R. Co.*, 83 N. J. L. 463; *Lapsley* v. *Public Service Corporation*, 75 id. 266.) This court is bound by the interpretation placed upon the foreign statute by the highest court in the foreign State. (*Jessup* v. *Carnegie*, 80 N. Y. 441, 455.) Section 405 of the Code of Civil Procedure in no way aids the plaintiff. In holding to the contrary, and relying upon the case of *Gaines* v. *City of New York* (215 N. Y. 533), the learned justice at Special Term overlooked the distinction between a condition precedent and a statute of limitations. It was a statute of limitations that was involved in the *Gaines* case. Furthermore, it is contrary to the principles of law established in this country that the Legislature of one State may in any way enlarge a right conferred by the statute of another State."

It will thus be seen, although the Court had clearly in mind the fact that in the case of *Sharrow* v. *Inland Lines*,

Ltd., 214 N. Y. 101 it had been held that the time limitation in an action under the New York Statute to recover damages for death caused by wrongful act was a statute of limitation, none the less, in construing the time limitation in the New Jersey Act, it considered itself bound by the interpretation placed upon that statute by the highest Court of the State of New Jersey.

Also in the case of *Gatti Paper Stock Corporation* v. *Erie Railroad Company*, 247 App. Div. 45 (affirmed without opinion, 272 N. Y. 535), the Court held that the time limitation in the statute there under consideration (New Jersey Railroad Act) Section 58, (3 Comp. Stat. p. 4246) was a condition precedent to the right to maintain the action. That at the termination of that time, the liability expires, leaving nothing thereafter on which to predicate an action. At page 47 of its opinion, the Court said:

> "Where a liability is created by a statute, and the same statute that creates the liability limits the right of action thereon to a stated period of time, the effect is that at the termination of that time the liability expires, leaving nothing thereafter on which to predicate an action. In the case of *Fairclough* v. *Southern Pacific Co.* (171 App. Div. 496; affd., 219 N. Y. 657) this court recognized and stated the foregoing proposition and held that compliance with the time requirement of the statute is a condition precedent that is applicable in whatever jurisdiction an action predicated on the statute may be commenced, as distinguished from the merely procedural nature of a true Statute of Limitations which is applicable only in the jurisdiction of its origin."

Both of these actions were instituted by plaintiffs who were residents of New York and were both decided long after the Court of Appeals had handed down its decision

in *Sharrow* v. *Inland Lines, Ltd.*, 214 N. Y. 201, the case upon which petitioner's counsel places so much reliance in his attempt to sustain his contention that the Court of Appeals would have applied the New York Statute of Limitations in the case at bar.

The facts in the case at bar bring it squarely within the rule announced in Section 605 of the Restatement of Conflict of Laws, which reads as follows:

> "§605. Time Limitation on Causes of Action.
>
> If by the law of the state which has created a right of action, it is made a condition of the right that it shall expire after a certain period of limitation has elapsed, no action begun after the period has elapsed can be maintained in any state."

POINT III.

Petitioner has misconstrued the ruling of the North Carolina Supreme Court in the case of *Tieffenbrun* v. *Flannery*, 198 N. C. 397.

Petitioner's counsel attempts to spell out of the ruling of the North Carolina Supreme Court in the case of *Tieffenbrun* v. *Flannery*, 198 N. C. 397, a hard and fast rule that the limitation in actions for wrongful death occurring outside of the State of North Carolina are to be considered as mere statutes of limitation and in such cases will apply North Carolina statutory limitation as the law of the forum.

The *Tieffenbrun* case was brought by a resident of the State of Missouri against the defendant, a resident of North Carolina, to recover for the death of her intestate which occurred in the State of Florida. The suit to recover thereon was brought more than one year after the death

occurred and less than two years thereafter. As appears from the statement of the case, pages 397-398, in which the judgment rendered in the lower court is quoted, both counsel agreed and admitted in open Court that the statutory laws of Florida, as set forth in the complaint, were correct and that the statute of limitations of the State of Florida applicable to actions for wrongful death is not contained in the statute creating such right of action and that it is not a condition of such action, but is a general statute of limitations contained in a separate statute, to wit, in the Revised General Statutes of Florida for 1920, §2939, subsection 6, which reads as follows:

> "Within two years.—An action by another than the State upon a statute for a penalty or forfeiture; an action for libel, slander, assault, battery or false imprisonment; an action arising upon, or account of an act causing a wrongful death."

We have, therefore, a concession made in open Court by both parties that the time limited by the Florida statute for the institution of suits to recover for wrongful death was a mere general statute of limitations. Under these circumstances there was no alternative left to the North Carolina Supreme Court but to apply the law of the forum, which provided that actions for wrongful death shall be commenced within one year. The Court in its opinion, at page 402, clearly stated the only question of law it decided or intended to decide in the following language:

> "The determinative question, then, is whether the time limit of C. S., 160, constitutes a statute of limitation *as well as* a condition annexed to liability." (italics supplied).

Petitioner's counsel proceeds on the erroneous theory that the North Carolina Supreme Court in the *Tieffenbrun*

case should have construed the two year time limitation of the Florida statute as a condition annexed to the cause of action, and in refusing to do so violated proper rules of comity.

Clearly there was no basis for the North Carolina Court to construe the time limitation in the Florida statute as other than a general statute of limitations. As is set forth in §605 of the Restatement of Conflict of Laws in the comment under that section:

> "A general statute of limitations is not construed as conditioning rights."

Reference is also made in petitioner's brief to the headnotes appearing in the report of the *Tieffenbrun* case at 68 A. L. R. 210 to sustain petitioner's contention. All that the Court determined was that the North Carolina wrongful Death Statute constituted a Statute of Limitations as well as a condition annexed to the liability.

The two other cases cited by the petitioner's counsel as sustaining this contention, namely, *Theroux* v. *Northern Pacific R. R. Co.*, 64 Fed. 84, 12 C. C. A. 52; and *Keep* v. *National Tube Company*, 154 Fed. 121, are distinguishable. In each instance the Court found that the limitation contained in the statute pursuant to which suit was instituted in the foreign jurisdiction was a condition annexed to the cause of action and not a mere limitation of time within which the remedy might be prosecuted.

There is nothing inconsistent in the holding of the North Carolina Supreme Court in the case of *Tieffenbrun* v. *Flannery, supra,* with its repeated rulings set forth in Point I of this brief, that the time limitation in the North Carolina Death Statute is a condition annexed to the cause, which must be alleged and proved by the plaintiff in order to make out a cause of action.

POINT IV.

The applicable authorities indicate the courts of New York would have construed the time limitation in the North Carolina statute as the District Court and the Circuit Court of Appeals have done.

Petitioner's counsel in Point III of his brief attempts to show that if the motion to dismiss in the case at bar had been made in the New York Supreme Court, that Court, following the public policy of the State, would have construed the time limitation in the North Carolina statute as a mere statute of limitation and denied the motion to dismiss. As authority he cites the case of *Sharrow* v. *Inland Lines, Ltd.*, 214 N. Y. 101, Sections 13 and 55 of the New York Civil Practice Act.

The *Sharrow* case simply decided that the time prescribed by the New York statute (Decedent Estate Law, Section 130) within which an action to recover damages for death caused by wrongful act may be commenced, is a statute of limitation.

However, as has been held by the New York Courts on numerous occasions, Section 130 of the Decedent Estate Law, though general in terms, creates a right of action only for wrongful death occurring in the State of New York and has no application to an action for wrongful death granted by a statute of another State. See *Baldwin* v. *Powell*, 294 N. Y. 130; *Johnson* v. *Phoenix Bridge Co.*, 197 N. Y. 316; *Whitford* v. *Panama R. R. Co.*, 23 N. Y. 465.

That the time limitation contained in Section 130 of the Decedent Estate Law has no application to an action for wrongful death brought under the statute of another State was clearly indicated by the Court of Appeals in its subsequent decision in the case of *Schwertfeger* v. *Scandina-*

vian American Line, 186 App. Div. 89; Aff'd 226 N. Y. 696. Im that case, in construing the time limitation of the New Jærsey Death Statute, it followed the law as laid down by the highest Court of the State of New Jersey rather than the rule announced in the *Sharrow* case.

There is also an attempt on the part of petitioner's counsel to find some support for his contention in Sections 13 and 55 of the New York Civil Practice Act, as Amended, by Chapter 516 of the Laws of 1943. These sections are set forth in full in the appendix to petitioner's brief, pages 9 and 10. Also at page 23 of the Record.

Prior to the amendment in 1943, Section 13 of the Civil Practice Act read as follows:

> "§13. Limitation in action arising outside of the state. Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws of a state or country where the cause of action arose, for bringing an action upon such cause of action, except where the cause of action originally accrued in favor of a resident of this state."

The report of the Law Revision Commission which recommended the amendment of this section, Legislative Document (1943) No. 65 F, states in reference to Section 13 of the Civil Practice Act at pages 8 and 9, as follows:

> "This provision was originally enacted in 1902. Its generally recognized purpose is to prevent the bringing of actions in New York upon causes of action that arose in another jurisdiction when the remedy in such jurisdiction is barred by a limitation period shorter than that obtaining in New York. An exception is made where the person to whom the cause of action originally accrued was a resident of

New York at the time. As to actions by non-residents coming into the state to sue, or assigning their claims to New York residents, the section makes applicable the limitation period of the place where the cause of action arose whenever that period is shorter than the corresponding New York period.

"Like section 55 of the Civil Practice Act, section 13 does not state whether the foreign period of limitation controls when it is longer than the New York period. However, it is settled that section 13 does not apply so as to allow a longer period for bringing action when the foreign period exceeds the New York period. *Meyers* v. *Credit Lyonnais*, 259 N. Y. 399 (1932).

"The Commission believes that the rule stated in section 13 is sound in policy, and proposes no change. It recommends, however, that the section be amended to state affirmatively the existing rule, that where the foreign period of limitation is *longer* than that provided by the New York law, the New York law controls."

Section 55 of the Civil Practice Act prior to its repeal in 1943 read as follows:

"§ 55. Action against nonresident. Where a cause of action, which does not involve the title to or possession of real property within the state, accrues against a person who is not then a resident of the state, an action cannot be brought thereon in a court of the state against him or his personal representatives after the expiration of the time limited by the laws of his residence for bringing a like action, provided that if the limitation of the time fixed by the laws of his residence for bringing such action be less than the time fixed by the laws of this state for a like action, the limitation fixed by the laws of this state shall apply."

In recommending enactment of a new Section 55 the Commission stated at page 8 of its report, as follows:

> "The first part of this provision was originally enacted in 1877, and in its original form made an exception in favor of claimants resident in New York. This exception was deleted in 1916, and the proviso now appearing in the statute was added.
>
> "Section 55 does not state whether the foreign period of limitation controls when it is longer than the New York period. It is settled by decision, however, that it does not control, and that the New York period of limitation applies. *Kirsch* v. *Lubin*, 131 Misc. 700 (1927), aff'd, 223 App. Div. 828, aff'd, 248 N. Y. 645. But under the proviso added to section 55 in 1916, the New York period also controls if the period limited by the laws of defendant's residence is less than the term fixed by the New York law. The net result of section 55 as thus construed is that the period of limitation prescribed by the law of the place where defendant resided at the time the cause of action accrued, controls the commencement of an action in New York, only where such period coincides with that provided by New York law. The proviso nullifies completely the original enactment, and the section has no practical effect.
>
> "The Commission recommends that section 55 be rewritten to state the existing law."

If anything more were needed to show that these two sections of the Civil Practice Act are general statutes of limitation which have no application to a statutory cause of action such as the one asserted by the plaintiff in the case at bar, it is provided at page 30 of Legislative Document (1943) No. 65F compiled by the Law Revision Commission which recommended the proposed changes in these two sections of the Civil Practice Act where the following appears:

"* * * Section 605 of the Restatement does not conflict with Section 13 of the Civil Practice Act."

Also

"Section 605 of the Restatement which bars an action based on a right created by the law of the state where the cause of action arose, and becomes extinct after the expiration of a certain time, is generally recognized as sound."

Throughout the entire study submitted by the Law Revision Commission in its recommendation to the Legislature concerning the proposed amendments to Sections 13 and 55 of the Civil Practice Act there is not a single reference indicating that the provisions of these two sections have any application to a cause of action for wrongful death instituted under the provision of the Death Statute of a foreign State which contains a time limitation which has been construed by the highest Court of the State enacting the statute to be a condition annexed to the right. The study does, however, cite in the footnote at page 30 the comment and illustration contained in Section 605 of the Restatement of Conflict of Laws as follows:

"COMMENT:

"a. This provision is not infrequent in the case of statutory wrongs and particularly in the case of the statutory action for wrongful death (see sec. 397, Comment b). The limitation need not be contained in the statute creating the right, but may be found in any statute specially directed at a qualification of the right. A general statute of limitations is not construed as conditioning rights.

"ILLUSTRATION:

"1. By a statute of X, the next of kin of a person whose death is caused by the negligent act of another may recover damages provided an action is brought within one year from the time of the death. By a statute of Y, the next of kin of a person whose death is caused by the negligent act of another may recover damages provided an action is brought within two years from the time of the death. A is killed in state X by the negligence of B. Sixteen months later, C, A's next of kin, brings an action in state Y against B for negligently causing A's death. The action cannot be maintained."

POINT V.

Conclusion.

The petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be denied.

All of which is respectfully submitted.

May 28, 1946.

THOMAS W. DAVIS,
Wilmington,
North Carolina,

M'CREADY SYKES,
45 Wall Street,
New York 5, New York,
Counsel for Respondent.

STEWART & SHEARER,
45 Wall Street,
New York 5, New York.
Attorneys for Respondent.